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Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

October Term 1989

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BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

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QUESTION PRESENTED HEREIN

Is the decision of this Court in *Roe v. Wade* sufficiently implicated in the cases at bar, *Turnock v. Ragsdale* and *Minnesota v. Hodgson*, for *Roe v. Wade* to be reconsidered?

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INTEREST OF AMICUS[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The Illinois and Minnesota legislation at issue herein is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its Illinois and Minnesota affiliates, Illinois Federation for the Right to Life and Minnesota Citizens Concerned for Life. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Minnesota regulations at issue herein.

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[1] This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

In *Webster v. Reproductive Health Services*, members of the majority differed on whether and to what extent *Roe v. Wade* should be reconsidered. From the decisions of this Court, a logical, coherent, and sequential analysis may be constructed to govern when it is necessary to decide a constitutional issue, in fulfillment of this Court's constitutional duty to decide a case properly before it. Failure to follow this analysis has resulted in anomalous results, evident in the decisions of this Court in the last term, and confusion in the law, evident in the wake of *Webster*.

Applying this analysis, it is clear that reconsideration of precedent is required whenever a case is brought on the basis of the right and/or analysis created in that precedent. The right declared and the analysis to be employed in constitutional review are but means of applying the Constitution. The ultimate question in constitutional review is what the Constitution requires. This is always at issue in constitutional review, making the case declaring a right and/or analysis always at issue in such cases. Thus, the Court must always establish the standard of review, either implicitly or explicitly, in determining the constitutionality of a statute.

Furthermore, a court is required to give a reasoned, legal justification for its decision. This must resolve those constitutional issues embraced by an analysis of the case. This requires resolution of the issues associated with the standard of review. Thus, a precedent which establishes a constitutional right or sets forth the analysis to be employed in determining the constitutionality of a statute under that right must be reconsidered whenever the constitutionality of a statute is challenged on the basis of that right or employing that analysis. Therefore, reconsideration of *Roe v. Wade* may not be avoided in the cases at bar.

Moreover, although sufficient implication of *Roe* for reconsideration of that case is inherent in its seminal status, the

cases at bar implicate *Roe's* core analysis more fully than did *Webster.* Additionally, the confusion created by *Webster* itself implicates the heart of Roe's analysis, making reconsideration based upon the effect of that decision alone a constitutional necessity. Therefore, *Roe v. Wade* should be reconsidered in the cases at bar.

ARGUMENT

INTRODUCTION

The decision of this Court in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), settled the small portion of abortion jurisprudence encompassed by the Missouri statutes at issue in that case. But *Webster* settled these matters in a way which unsettled the remainder of abortion law.

Issues now unresolved go to the very core of this Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973). Were *Roe* and/or its later progeny overruled sub silentio in *Webster?* Is a woman's interest in obtaining an abortion a fundamental right, a limited fundamental right, or a liberty interest? Will abortion legislation now be reviewed under the traditional compelling interest standard or is an unduly burdensome analysis the de facto standard? What is an undue burden? Is the trimester scheme overruled or yet viable? Must abortion regulations be narrowly tailored to effectuate the underlying state interest or only reasonably related to the interest?

This confusion arose from the inability of the members of this Court to agree on the analysis to be employed in determining when constitutional necessity requires the reconsideration of precedent. The majority which decided Webster disagreed over whether and to what extent *Roe v. Wade* should be reconsidered. A particular focus of the debate was the "necessity" principle employed by this Court to "avoid [] passing upon a large part of all the constitutional questions pressed upon it for decision . . . , notwithstanding conceded jurisdiction, until *necessity* compels it in the performance of *constitutional duty.*"

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 569 (1947)(emphasis added).

This Court has never set forth, in one place, the full analysis by which to determine when the necessity exists which compels this Court to fulfill its constitutional duty to decide a constitutional issue. By reviewing the duties and limitations imposed upon this Court by the Constitution, its jurisdictional statutes, and prudence, one may discern a clear pattern. This brief sets out this pattern, logically organizing the duties and limitations of this Court into a coherent analysis. This analysis is then applied to determine whether reconsideration of *Roe v. Wade* is constitutionally necessary in the cases at bar.

I. A LOGICAL, COHERENT ANALYSIS GOVERNING THE CONSTITUTIONAL NECESSITY FOR THIS COURT TO DECIDE A CONSTITUTIONAL ISSUE IS DISCERNIBLE FROM PRECEDENT.

A. FOUR ELEMENTS GOVERN THE CONSTITUTIONAL NECESSITY OF DECIDING A CONSTITUTIONAL ISSUE UNDER THIS COURT'S PRECEDENTS.

Four elements govern whether, in a particular case, the decision of a constitutional issue is necessary in the performance of constitutional duty: (1) a constitutional duty to say what the law is, (2) a constitutional limitation of decision opportunities to cases and controversies, (3) a statutory limitation on subject matter jurisdiction, and (4) prudential principles imposed by this Court upon itself for sound jurisprudential reasons.

1. THIS COURT HAS A DUTY TO INTERPRET THE CONSTITUTION.

"It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803)(emphasis added). So declared this Court in the famous case of *Marbury v. Madison*, in which it deter-

mined the Constitution to be the supreme law of the land, governing even enactments of Congress. *Id.* at 177-79. This Court also decided in *Marbury* that it had authority to review actions of other elements of government to determine whether they comported with this Court's declaration of "what the law is" with respect to the Constitution. *Id.*

This Court could most comprehensively fulfill its duty to declare what the law is by publishing its own commentary on the law, in the manner of William Blackstone or Lord Coke. Of course, such a project would be of immense and prohibitive proportions, and no commentary could cover every conceivable issue.

More significantly, however, this Court is prohibited from roaming about the constitutional field in such a manner by its constitutional charter. There are limits placed upon its power and duty to say what the law is, which are set forth in detail below.

However, these limitations must not be employed to avoid deciding matters which this Court has a duty to decide. Professor Gunther has styled as a neo-Brandeisian fallacy the misuse of the "necessity" principles set forth by Justice Brandeis in his concurrence to *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring), to support a view that this Court has a general discretion not to adjudicate. *See generally* G. Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964)(commenting on the content and uses of the *Ashwander* rules). *Cf.* Wechsler, "Toward Neutral Principles of Constitutional Law," in *Principles, Politics, and Fundamental Law (1961).*

The duty to decide, when constitutionally required, is illustrated by Justice Marshall in Marbury, where he felt compelled, in giving a legal justification for his decision, to comment on matters not necessary to the decision of the case but necessary to a legal justification of the case. He wrote:

> The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

Marbury, 1 Cranch at 154. To this comment must be added another of Justice Marshall's remarks in the case of *Cohens v. Virginia*, 6 Wheat 264, 404 (1821):

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty.[2]

2. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY ARTICLE III OF THE CONSTITUTION.

The Constitution of the United States allows this Court to interpret the Constitution only in relation to "Cases . . . arising under this Constitution." U.S. Const. art. III, § 2.

From this limitation arise certain rules, which Justice Brandeis set forth in his concurring opinion to *Ashwander v. TVA*, 297 U.S. at 346-48 (1936)(Brandeis, J., concurring). These rules apply even where jurisdiction is conceded under the controlling jurisdictional statutes, *id.* at 346, for they are constitutionally mandated by Article III.

Justice Brandeis set forth these rules as follows:

First, "[t]he Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding. *Id.* at 346.

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[2] This brief does not enter into the debate over this Court's discretion to decline the exercise of jurisdiction. It merely addresses the necessity of deciding all elements of a case which are required in giving a legal justification for this Court's decision in a case which is decided by this Court. Your amicus does not believe that the standard of review is an issue which may properly be avoided. It is different in kind from construing a statute to avoid constitutional difficulty or deciding a case on procedural grounds to avoid a constitutional issue.

Second, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citations omitted).[3]

Third, "[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." Id. at 347.

Fourth, "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." Id. at 348.

3. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY ITS JURISDICTIONAL STATUTES.

Pursuant to its authority to "ordain and establish" federal courts, U.S. Const. art. III, § 1, Congress has enacted jurisdictional statutes which require a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States" for federal district court jurisdiction. 28 U.S.C. §§ 343(3) and 1331. Without satisfaction of these prerequisites, the cases at bar should not have come before this Court by way of the lower federal courts.[4] Similarly,

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[3] As noted *infra*, the question of establishing the appropriate standard of review is a necessary decision to this Court's constitutional review of a case and not a discretionary matter which may be avoided if convenient.

[4] In addition to establishing the proper standard of review, this Court must also examine its jurisdiction. As noted in text, this Court only has jurisdiction over these cases if there is yet a constitutional right to abortion.

In *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), this Court declared that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts

(footnote continued)

had these cases come up through state courts, this Court could only have heard them if the statutes at issue were "repugnant to the Constitution" or if a constitutional right were claimed. 28 U.S.C. § 1257.

4. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY PRUDENTIAL CONSIDERATIONS.

Self-imposed, prudential principles have been developed by this court, based upon policy considerations. These rules were summarized in Justice Brandeis' *Ashwander* concurrence as follows:

First, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring)(citations omitted).

Second, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.*

Third, "'[w]hen the validity of an act of the Congress[5] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* at 348 (citation omitted).

Footnote 4 continued
in a cause under review,' even though the parties are prepared to concede it." *Id.* at 541 (citation omitted). The question of jurisdiction is a "fundamental" one, which "the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547. Thus, in determining whether subject matter jurisdiction lies in the present case, this Court must carefully consider *Roe*, the case upon which federal jurisdiction rests.

[5] This principle has been extended to acts of state legislatures, as well. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 737 F.2d 283, 294 (1984).

B. THESE FOUR ELEMENTS FORM A LOGICAL, SEQUENTIAL ANALYSIS TO BE EMPLOYED IN ANALYZING THE NECESSITY OF DECIDING A CONSTITUTIONAL ISSUE.

These duties and rules may be arranged in logical, sequential order. The result is conceptually similar to a series of increasingly fine filters; the analysis filters cases, then issues, and then grounds of decision at subsequent levels until only those which are properly to be decided remain. The phases of the analysis are as follows:

1. *Is there a case or controversy?* Logic compels that initial consideration be given to the requirements of the Constitution, which authorized creation of this Court and granted it powers within the jurisdiction to be prescribed by Congress. Justice Brandeis' four rules dealing with Article III, set forth above, are properly asked at this point. These questions determine whether a concrete, adversarial context exists for the resolution of constitutional issues. They prevent abstract decisions on hypothetical points.

2. *Is there jurisdiction?* Logic likewise compels that the jurisdictional statutes be next examined. Congress further defined the jurisdiction of this Court and created the lower courts and limited their jurisdiction by these statutes. These statutes require, in part relevant herein, that a suit must be initiated based upon the violation of a constitutional right.

If there is an Article III case and jurisdiction exists, then the case itself is properly before this Court, whether it arrives by grant of a writ of certiorari or by appeal.

3. *Are there prudential reasons for avoiding certain aspects of the case?* At this point, the three prudential rules of Justice Brandeis' *Ashwander* principles must be considered. Is there some statutory or procedural basis for decision by which a constitutional decision may be avoided? May a statute be construed in a manner favoring constitutionality? If a constitutional decision must be made, what are the narrowest possible grounds upon which it may be properly made?

This last question must be asked in light of this Court's duty both to say what the law is by interpreting the Constitution when required and by its judicial duty to give the legal basis for its decision in a reasoned manner. Reasoned exposition of all elements of the analysis which are logically required in order to give an explanation of that legal basis of the decision must be deemed necessary to the decision.

The proper filtering analysis decides first which cases must be heard, then — employing prudential considerations — what issues must be heard, and finally what grounds must logically be given to support the decision. Prudence requires that the fewest possible issues be resolved on the lowest level of grounds required. The required grounds are all those necessary to logically justify the decision. This analytically includes the standard — the constitutional analysis — to be employed. Without such a determination, the decision has not been legally and logically justified.

C. CONSIDERATION OF SOME SPECIFIC QUESTIONS CONCERNING RECONSIDERATION REVEAL THAT RECONSIDERATION OF *ROE v. WADE* IS APPROPRIATE IN THIS CASE.

Finally, some specific questions with regard to reconsideration have arisen in the opinions of this Court. These questions have already been settled and require brief exposition at this point.

First, *must the parties ask for reconsideration?* No. Necessity of reconsideration of a constitutional issue is not determined by whether the parties have requested reconsidera-

tion.[6] Just last term, in *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989), this Court reconsidered *Runyon v. McCrary*, 427 U.S. 160 (1976), without any request from the parties. *Patterson*, 109 S.Ct. at 2380 (Brennan, J., dissenting)("I find it disturbing that the Court has in this case chosen to reconsider, without any request from the parties . . . .").

Second, *is it sufficient for reconsideration if the right created by a prior case is the basis of the claim in a later case?* Yes. This is the basis upon which the Court reconsidered the *Patterson* case. In *Patterson*, the plaintiff brought an action based upon the statutory right created by an interpretation of 42 U.S.C. § 1981 in *Runyon*, 427 U.S. 169, i.e., that § 1981 encompasses a private contract between an employer and employee. It is a more difficult task where a prior case is not as directly implicated as to provide the right upon which the suit is founded. This is evident in *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), decided by this Court last term. In *Gathers*, Justices O'Connor and Kennedy and Chief Justice Rehnquist, in dissent, decided that the holding of the prior case of *Booth v. Maryland*, 482 U.S. 496 (1987), was not sufficiently implicated for reconsideration of that case. *Id.* at 2212 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.). This was so because *Gathers* involved prosecutorial comments about a criminal victim's character in closing argument, not in the submission of evidence which *Booth* forbade. Thus, *Booth* was not sufficiently implicated for Justices O'Connor and Kennedy and Chief Justice Rehnquist to reconsider that case. *Id.* at 2211.

[6] *In Thornburgh v. American College of Obstetricians and Gynecologists*, Justice O'Connor implied that she would not reach the issue of reconsideration of *Roe v. Wade* because the parties had not asked the Court to do so. 106 S.Ct. at 2213. However, in *Akron v. Akron Center for Reproductive Health*, she personally reached the issue of *Roe's* constitutional correctness and declared much of it unconstitutional, despite the fact that the parties had not asked the Court to reconsider *Roe*, a point which she expressly noted. 462 U.S. at 458, 452. Further, in *Webster*, she declared her willingness to reconsider Roe in a proper case.

Justice Scalia would have overruled *Booth*, *id.* at 2217-18, as, apparently, would have Justice White. *Id.* at 2211.

Third, *may this Court decide a case on broader principles than reasonably required by the precise facts of the case before it in appropriate circumstances?* No, but it must resolve a sufficient number of constitutional issues to give a reasoned, legal justification for its decision. This properly includes a decision concerning the standard of review, i.e., in this case, whether or not the analysis of *Roe v. Wade* is still good law. It may also include resolution of other matters not required by a simple judgment of affirmation or reversal which are, however, necessary to give a legal justification for the decision rendered. This question is often erroneously framed as whether a decision may be made on a broader than necessary basis. When "necessary" is properly understood to encompass those matters necessary to giving the required legal justification for a decision, the confusion is resolved. The rule, then, is that no Court should declare a rule of constitutional law broader than required by the precise facts of the case, but that this concept includes matters, such as resolving the appropriate standard of review (even if that requires reconsideration of precedent), necessary to giving a reasoned, legal justification for the decision.[7]

[7] Many examples exist where this Court has decided issues it felt necessary to giving a legal justification for its decision but has been criticized for reaching issues not necessary under the facts of the case. Because all matters necessary to a legal justification of an opinion are required but decision of other matters is not permitted, the question of what matters ought to be addressed in an individual case is one subject to differing judgment. In *City of Richmond*, 109 S.Ct. 706 (1989), Justice O'Connor, writing for the Court, authored an opinion which went beyond the facts to state a set of governing principles — presumably to give legislative bodies guidance in developing the law. *Id.* at 735. This was observed by Justice Marshall, writing for the dissent. *Id.* at 752 (Marshall, J., dissenting)("the majority has gone beyond the facts of this case to announce a set of principles"). In another case from last term, *Perry v. Leeke*, 109 S.Ct. 609 (1989), this Court reached an issue which Justice Kennedy did not feel was necessary to the decision. *Id.* at 602

(footnote continued)

This principle explains Justice Marshall's decision in *Marbury* to comment on matters required for giving a legal justification for the Court's decision. He expressed both his sensitivity to avoiding overbroad decisions and the need to resolve those constitutional issues required for a legal justification of his opinion. In discussing the issue of whether a mandamus could go to the Secretary of State, he wrote, "It may not be proper to mention this position; but I am compelled to do it." *Marbury*, 1 Cranch at 149. He was compelled to do it because of this Court's duty to provide a reasoned, legal justification for its ruling. He commented, "These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration." *Id.* at 156.[8]

Footnote 7 continued
("In view of our ruling, it is quite unnecessary to discuss whether prejudice must be shown when the right to counsel is denied. I would not address that issue . . . ."). Other cases where the Court has been accused of deciding more broadly than the precise facts required are *Daniels v. Williams*, 474 U.S. 327 (1986); *Illinois v. Gates*, 462 U.S. 213 (1983); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Pointer v. Texas*, 380 U.S. 400 (1965); and *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court has even expressly acknowledged its broader than strictly required holding in some cases, such as *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), and *Perez v. Campbell*, 402 U.S. 637 (1971).

Acknowledging that resolution of all issues necessary to a reasoned legal justification of this Court's decision is required but that going beyond that is forbidden resolves the tension between the practice of this Court in the cases above and its rule against overly broad decisions.

[8] Much debate has raged over Justice Marshall's decision, *see e.g.*, Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, including the criticism that, given its conclusion, the Court should have said only that it lacked jurisdiction. Much of what was said in the early part of the opinion, regarding the propriety of issuing mandamus against an executive's illegal acts, might be characterized as *obiter dictum*. Indeed, Thomas Jefferson, the contemporary President and a key player in the *Marbury* drama, insisted throughout his life that most of *Marbury* was "merely an obiter dissertation of the Chief Justice." *Jefferson to Justice William Johnson, June*

(footnote continued)

I. THE FAILURE OF THIS COURT TO AGREE UPON AND FOLLOW SUCH AN ANALYSIS CONCERNING RECONSIDERATION HAS INTRODUCED CHAOS INTO THE LAW AND INTO THIS COURT.

The disagreement on this Court over the analysis to be applied with regard to reconsideration of precedent is evident in three cases from last term where reconsideration was considered and treated in three different ways. The chaotic results which flow from this failure to agree on an analysis are illustrated by two abortion cases, *Roe v. Wade* and *Webster v. Reproductive Health Services*. The former overreached, causing this Court in *Akron* to overrule part of that decision. The latter underreached, creating chaos in abortion law. Either approach is wrong, both for sound jurisprudential reasons and because of the illicit results.

A. THAT THIS COURT HAS NOT AGREED UPON AN ANALYSIS FOR RECONSIDERATION IS EVIDENT FROM THIS PAST TERM.

In this past term, this Court considered three key cases in which reconsideration was proposed. The inconsistent manner in which these were handled reveals the lack of an agreed analysis for reconsideration.

In the first case, *Patterson v. McClean Credit Union*, 109 S.Ct. 2363, this Court plenarily reconsidered *Runyon v. McCrary*, 427 U.S. 160. There was no disagreement among the majority over whether reconsideration should occur, although, as noted *supra*, neither party asked for reconsideration and the sole implication of the prior decision was that it created the right under which the action was brought.

Footnote 8 continued
12, 1823, I S. Car. His. & Gen. Mag. 1, 9-10 (1900). Justice Marshall himself later called some of his statements about Article III in *Marbury* unduly broad and partially rejected them in *Cohens v. Virginia*, 6 Wheat 264 (1821). Nonetheless, the fact that he may have erred by going somewhat beyond what was required to give a legal justification for his decision does not vitiate the principle. His error, if any, was of degree and not of principle.

In the second case, *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, the members of the majority could not agree that reconsideration was proper even though *Roe v. Wade* created the right under which the action was brought. And such reconsideration as was called for was not plenary, with the exception of that proposed by Justice Scalia. The plurality declared that only the trimester scheme was implicated and Justice O'Connor thought that nothing of Roe was implicated.[9]

As argued in this brief, however, distinguishing the degrees of implication of a seminal case — one which creates the right or analysis under which the cause of action arose — is unnecessary. Such a case is always fully implicated in a cause which invokes that right or analysis. Such distinguishing of degrees of implication was not engaged in in *Patterson*, nor is it appropriate under the principle that the decision of all matters necessary to a reasoned justification of the Court's decision — including establishment of the standard of review — is constitutionally necessary. The result of the failure of this Court to employ a consistent analysis with regard to reconsideration resulted in turmoil and confusion in abortion jurisprudence, as more fully set forth *infra*. It further resulted in the failure of a majority of this Court to address a decision, *Roe*, which five Justices have declared to be constitutionally flawed.

In the third case, *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), the very decision-making process of the potential working majority in that case was disrupted by its inability to agree on an analysis regarding reconsideration. It is apparent from the opinions in Gathers that five Justices of this Court believe that *Booth v. Maryland*, 482 U.S. 496 (1987) — the case which created the right of criminals not to have evidence of their

[9] It must be noted that Justice O'Connor viewed the Missouri statute as not inconsistent with *Roe* or its progeny because it did not "unduly burden" the abortion right. However, this unduly burdensome or "absolute obstacle" test, championed in *Akron* by Justice O'Connor, and under which she would have upheld the ordinances at issue in *Akron*, was expressly rejected by this Court as violative of *Roe v. Wade*. *Akron*, 462 U.S. at 420 n.1.

victim's character introduced at trial — was wrongly decided. The result, however, was the extension of the reach of *Booth v. Maryland* to prosecutorial statements about the victim's character.

While judicial restraint is admirable and required by sound, constitutional jurisprudence, it is improperly applied to avoid considering the precedent which creates the foundational right upon which a cause is brought. Consideration of that foundational right, and the case creating it, is essential in giving a reasoned, legal justification for this Court's decision in any case based upon that right. The havoc wrought by this Court's failure to consistently apply the sort of analysis proposed herein is further illustrated in two cases, *Roe* and *Webster*.

B. *ROE v. WADE* DEMONSTRATES THE OVERREACHING POSSIBLE WITH AN INADEQUATE ANALYSIS AND THE RESULTANT OVERRULING REQUIRED.

Roe demonstrates both the matters necessary to deciding a constitutional issue and the perils in deciding those that are not necessary.[10] The *Roe* majority correctly began by establishing the proper standard of review, to which it devoted the majority of the opinion. Given its judgment that the Texas criminal abortion statute — excepting only cases of risk to maternal life — was unconstitutional, the Court needed to decide the issues necessary to give a reasoned, legal justification of its decision. To merely strike down the Texas statute, without explanation, would not have fulfilled this Court's constitutional duty to declare what the Constitution means when deciding the case.[11]

[10] This, of course, in no way concedes any correctness as to the substantive holdings of the *Roe* Court.

would not have fulfilled this Court's constitutional duty to declare what the Constitution means when deciding the case.[11]

Necessary to a reasoned, legal justification of this Court's decision in *Roe* was its holding that there is a fundamental right to abortion. Likewise, a holding that no compelling interests extended throughout pregnancy was vital to the analysis. *Roe* also demonstrated proper restraint in not deciding the issues of paternal rights and parental rights (of parents with minors seeking abortion). *Roe*, 410 U.S. at 165 n.67. Deciding these issues, which were not presented by the facts, would have decided constitutional questions in advance of the necessity of doing so. In Article III terms, no case existed with respect to these matters, and, therefore, this Court was without constitutional authority to decide them.

Unnecessary to a reasoned, legal justification of the decision in *Roe* was creation of the trimester scheme. Also unnecessary were the inherently legislative declarations, such as the statement that a hospitalization requirement for post-first-trimester abortions was constitutionally permissible. The Court reached these issues in advance of the necessity of deciding them, violating Article III, and it decided matters more broadly than required by the facts, violating prudence. The *Roe* majority ought to have awaited another case involving a viability line to reach a discussion of viability. It should have decided the maternal health line in a case properly presenting that issue, such as a case requiring hospitalization for abortions after a certain point.

[11] Of course, this Court has the power to summarily affirm or reverse decisions in appropriate circumstances. However, constant reliance on such a practice would not comport with this Court's duty to decide. Practically, such a practice would also unduly prolong the trial and error, see-saw interaction between this Court and the legislatures in their attempt to pass constitutional legislation. Such considerations, however, do not justify overreaching beyond what is necessary to give a reasoned, legal justification of a decision.

The imprudence of such premature decision-making was demonstrated in the progeny of *Roe*, especially in the case of *Akron v. Akron Center for Reproductive Health*. 462 U.S. 416 (1983). In *Akron*, the majority found it necessary both to alter the trimester scheme, precipitously created in *Roe*, and to reject a post-first trimester hospitalization requirement, prematurely approved in *Roe*. *Akron*, 462 U.S. at 435-47.[12]

Thus, *Roe* well illustrates how a court may begin correctly and then go astray by overreaching. A proper analysis would preclude such overreaching.

C. *WEBSTER* DEMONSTRATES THE UNDERREACHING POSSIBLE WITH AN INADEQUATE ANALYSIS AND THE RESULTANT CHAOS ATTENDING SUCH ACTION.

By contrast with *Roe*, the *Webster* amalgam of opinions did not even begin correctly. Neglected was the essential first step in constitutional analysis, the determination of the standard of review — the constitutional analysis — to be employed in reviewing the statutes at issue. The core issue in any constitutional challenge to a statute is whether the statute comports with the Constitution — not whether it complies with a prior decision of this Court. Deciding whether a statute conforms to the requirements of some precedent is but a shorthand way of asking whether constitutional requirements are met. Therefore, it is essential to the analysis to determine what the Constitution requires. In a matter already decided, this question is answered by citation to precedent, the principles of which are applied to the new fact situation. But in each subsequent case, the question of what the Constitution requires must be asked. It may be simply answered by reaffirmation of the precedent, either express or implicit, but it must be

[12] *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 181 B.Y.U. J. Pub. L. 181, 202-07 (1989)(discussing this disregard of stare decisis at length).

answered. The Constitution is at issue in constitutional adjudication.

Therefore, in *Webster*, the constitutionality of *Roe v. Wade*, *was* before this Court. It could not properly be avoided. The standard of review, by which the Constitution is applied to determine the constitutionality of a statute, must be decided. It is not of a nature permitting avoidance until some more convenient time or some greater implication. If a case is brought to declare a statute unconstitutional on the basis of the decision establishing the right and setting forth the analysis, then that case is implicated. Once implicated, it must be applied, modified, or overruled; its reconsideration is then proper. A state need not reenact the Texas statute struck down in *Roe* before this Court may properly reconsider *Roe*.

Deciding the standard of review as a necessary first step in constitutional analysis is something one may not avoid by prudential principles. It is inherent in constitutional review. It is the very essence of constitutional review, serving as the link between the statutes reviewed and the Constitution. It is not of the same nature as a constitutional challenge to a statute which may be avoided by a permissible construction of the statute. Nor is it of the same nature as a constitutional challenge to a statute which may be avoided by deciding a matter on a statutory, procedural, or independent state law basis. The issue of the correct standard of review arises *precisely when the Court has been unable to avoid a constitutional question and must determine whether a statute is constitutional*. It is *inherently necessary* to decide in the discharge of this Court's constitutional duty and may not properly be avoided.

Therefore, *Webster* underreached — the Court did not fulfill its duty to say what the law is in justifying its decision. The resulting chaos demonstrates clearly why strict adherence to a sound analysis with regard to deciding constitutional matters, and especially the standard of review, is essential to sound constitutional adjudication. Indeed, the chaos created by *Webster* alone is sufficient to call this Court to say what the law is in the cases at bar.

The confusion resulting from *Webster* may be seen in the varying interpretations given to the opinion, which run along a spectrum from a *sub silentio* reversal of *Roe*, to a *sub silentio* reversal of the trimester scheme and this Court's most recent pronouncements in *Akron* and *Thornburgh*, to a mere funding case with few other implications. In light of such diversity of possibilities, how may the legislatures act? What is permitted?

One may of course say that nothing was overruled in *Webster*, for the Court used no such language. However, the notion of *sub silentio* reversal is a commonplace in the law. And is the meaning of a case circumscribed by its proper holding? The legitimate holding of *Roe* — if legitimacy be limited to that permitted by the narrowest holding based upon the specific facts — was but the tip of the iceberg which comprised the full meaning of *Roe* for abortion jurisprudence.

Justice Oliver Wendell Holmes declared that the state of the law is nothing more than a prediction of what a court will do at a given time with a given set of facts. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). Employing this analysis of legal realism, the meaning of *Webster* may be determined by examining the statements of various Justices, both in *Webster* and before, to determine what elements of abortion jurisprudence yet enjoy majority support. The result of such analysis raises significant questions.

1. IS THE *ROE* TRIMESTER SCHEME OVERRULED *SUB SILENTIO?*

It appears from the opinions in *Webster* that majority support for the trimester scheme of *Roe* has disappeared. Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissents to *Akron* and *Thornburgh*. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)("I . . . remain of the views expressed in my dissent in *Akron*. The State has

compelling interests in ensuring maternal health and in protecting potential human life . . . throughout pregnancy."). With Chief Justice Rehnquist and Justices White, Scalia[13], and Kennedy saying the same thing in *Webster*, it is readily apparent that a majority of this Court has now recognized these two interests as existing throughout pregnancy, indicating the demise of the trimester scheme. *Webster*, 109 S.Ct. at 3057.

But this Court has not stated this demise in express language. Will legislatures feel free to act upon it? By comparison with the small area of the law this Court settled in *Webster*, the areas it unsettled are immense, going to the core of *Roe v. Wade*.

2. IS THE ABORTION RIGHT NOW A LIBERTY INTEREST?

Similarly, the very nature of a woman's interest in choosing abortion is now unclear. In *Roe*, this Court determined that a woman has a fundamental right to choose abortion, employing a substantive due process analysis. The *Webster* plurality declared that a woman has only a "liberty interest" in abortion under the Due Process Clause of the Fourteenth Amendment. *Webster*, 109 S.Ct. at 3058. Justice O'Connor, with her advocacy of the rational basis standard of review in most cases, agrees that there is no general, fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right, evidenced by her requiring a compelling state interest to justify regulation of abortion in such cases. *Id.* Thus, there is now a majority of the Court which no longer believes that there is a general fundamental right to abortion. But what is the law? What does the Constitution require?

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[13] As Justice Scalia would reverse *Roe*, it is assumed that, to the extent a fundamental right to abortion is given continued recognition, he would agree that there are offsetting compelling interests in maternal health and unborn life.

3. IS *AKRON* OVERRULED *SUB SILENTIO* BY REHABILITATION OF THE UNDULY BURDENSOME TEST?

In *Akron*, this Court found the unduly burdensome test to be an unconstitutional form of analysis, forbidden by the dictates of *Roe v. Wade* itself. *Akron*, 462 U.S. at 420 n.1. Logically then, any invocation of, or reliance upon, the unduly burdensome test would be in direct derogation of *Roe*. However, in *Webster*, Justice O'Connor readily relied upon this analysis to uphold the statutes at issue in *Webster* and to declare that all of the Missouri statute could be upheld under prior decisions of this Court, at the same time arguing that no prior abortion decision of this Court was sufficiently implicated for purposes of reconsideration. *Webster*, 109 S.Ct. at 3060. At a very minimum, however, the resurrection of the unduly burdensome test implicated *Akron*, directly rejecting a key holding of that decision.

Is the unduly burdensome test — as the lowest common denominator of the current majority on abortion issues — the proper analysis to be employed by lower courts and legislatures? If *Akron* is indeed overruled *sub silentio*, is legislation such as that found in *Akron* and in *Thornburgh* now constitutional?

A further problem arises if Justice O'Connor's lowest-common-denominator analysis is now the *de facto* analysis for review of abortion legislation. It has been generally thought since *Roe* that the fundamental rights analysis required the showing (1) that the state has a compelling interest and (2) that the legislation enacted is narrowly tailored to effect only the compelling interest. *Roe*, 410 U.S. at 155. But Justice O'Connor wrote in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analy-

sis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle' be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting)(citations omitted and case names not italicized in original). Which standard must abortion legislation now meet — must it be narrowly tailored or rationally related to a compelling interest?

In sum, *Webster* has thrown abortion jurisprudence into disarray. The very core analysis of *Roe* has been placed in question: as to the nature of the interest, as to the standard of review, as to the temporal extent of the states' compelling interests, and as to the second prong of the *Roe* analysis for legislation burdening (unduly or not?) a fundamental right — if indeed, there is yet a fundamental right. And if the unduly burdensome test controls, what does unduly mean? This chaos alone compels this Court to perform its constitutional duty, which it avoided in *Webster* but which exists in these cases, to say what the law is.

III. EMPLOYING THE PROPER ANALYSIS TO THE ISSUE OF RECONSIDERATION HEREIN REVEALS THAT *ROE v. WADE* SHOULD BE RECONSIDERED IN THESE CASES.

A. THIS COURT SHOULD GO THROUGH THE FULL ANALYSIS TO DETERMINE WHAT ISSUES SHOULD BE DECIDED AND ON WHAT GROUNDS.

It is beyond the scope of this brief — which addresses reconsideration of *Roe v. Wade* — to apply the analysis herein in all of its respects to the statutes at bar. This Court should take this opportunity to employ a systematic approach to determine what issues should be decided and on what grounds. However,

if this Court decides to consider the constitutionality of any part of the statutes at issue herein, i.e., it finds that it cannot avoid them by decisions on other than a Constitutional basis, then it should reconsider *Roe*, which is the nexus between the Constitution and the statutes. *Roe v. Wade*, as both the source of both the right and analysis to be employed in constitutional review is clearly implicated for purposes of reconsideration.

B. THE ISSUE OF RECONSIDERATION ITSELF IS NOT ONE WHICH THIS COURT MAY AVOID IF IT CHOOSES TO DECIDE THESE CASES AND ISSUE A WRITTEN OPINION BECAUSE *ROE* AND ITS RIGHT AND ANALYSIS ARE CLEARLY IMPLICATED.

In giving a reasoned, legal justification for any decision reached in these cases, the Court must set forth the proper constitutional analysis to be employed. This requires reconsideration of *Roe v. Wade*. It is inherent in the analysis as discussed at length above.

Moreover, although further "implication" is not required, it is certainly present in these cases. These cases more directly implicate *Roe*, in terms of involving more of its analysis and affecting more periods of pregnancy, than did *Webster*. Unlike *Webster*, which largely involved funding matters (already settled in principle by this Court) and regulation after viability (where compelling state interests exist even under *Roe)*, the cases at bar implicate three key elements of *Roe*, the compelling interests in unborn life and maternal health throughout pregnancy, the right to effectuate the abortion decision, and the right to make the abortion decision in consultation with one's physician. The statutes at issue in these cases, therefore, directly impinge upon the right to abortion created in *Roe* to an even greater extent than in *Webster*.

1. COMPELLING STATE INTERESTS IN MATERNAL HEALTH AND UNBORN LIFE, WHICH UNDERLIE THESE STATUTES, ARE ASSERTED THROUGHOUT PREGNANCY.

Underlying the Minnesota parental notice statute at issue in *Hodgson* are compelling state interests in unborn human life and in protecting traditional family authority and vulnerable minors. Indeed, the Minnesota parental notice statute has had the demonstrated effect of reducing the adolescent abortion rate — dramatically furthering the State's compelling interest in protecting unborn human life.[14] Yet this statute applies throughout pregnancy, not just after viability.

Furthermore, underlying the Illinois clinic statute at issue in *Turnock* are the State's compelling interests in maternal health and in unborn life. These likewise apply throughout pregnancy. The State's compelling in protecting maternal health is the

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[14] Statistics from the Minnesota Department of Health indicate that in Minnesota during 1975-80, before the parental notice statute went into affect, minors showed the following annual patterns:

1. Pregnancies increased from 4142 to 4360 = an increase of 5%.

2. Births decreased from 2494 to 2033 = a decrease of 19%.

3. Abortions increased from 1648 to 2327 = an increase of 41%.

In the period from 1981-86, following enactment of the statute the following patterns emerged:

1. Pregnancies decreased from 4360 to 3171 = a decrease of 27%.

2. Births decreased from 2033 to 1626 = a decrease of 20%.

3. Abortions decreased from 2327 to 1545 = a decrease of 34%.

Data from Minnesota Department of Health (adjusted for population fluctuation).

There is no evidence that this dramatic drop in the abortion rate resulted from teens leaving the state to obtain abortions. Blum, Resnick & Stark, *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AJPH 619, 620 (1987).

principle justification of this regulatory scheme. The State's interest in protecting unborn life, however, is also advanced by the provision requiring counseling concerning alternatives to abortion. Ill. Rev. Stat. ch. 111 1/2, para. 205.730(b)(3). This counseling is intended, in part, and has the effect, to cause women to more seriously consider alternatives to abortion, thereby decreasing the number of abortions. Unborn lives are thereby saved.

Thus, for purposes of reconsideration, the holdings of *Roe* that the state's compelling interests in maternal health only arise after the first trimester and in unborn life after viability are squarely contradicted. In contrast, *Webster* involved only the State's compelling interest in unborn life after viability.

2. THE RIGHT TO EFFECTUATE THE ABORTION DECISION IS IMPLICATED.

The right to effectuate the abortion decision is also guaranteed by the decisions of this Court. *Roe*, 410 U.S. at 163. Under the Illinois statute at issue in *Turnock*, first trimester abortion clinics are thoroughly regulated. This again implicates a key holding of *Roe* that regulation of the abortion decision and its effectuation must be left to the woman and her physician in the first trimester. After that, regulation is only permitted for protection of the woman's health. In this case, it is asserted that such regulations are not indicated for the protection of maternal health, and, in any event, these regulations extend into the forbidden zone of the first trimester. For purposes of reconsideration, *Roe* is sufficiently implicated.

3. THE RIGHT TO CONSULT ONE'S PHYSICIAN IN MAKING THE ABORTION DECISION IS FORBIDDEN.

Finally, a direct and absolute bar to one of *Roe's* key elements is present in the Illinois provision (at issue in *Turnock*) which prevents anyone with a monetary interest in the performance of the abortion decision from counseling a woman concerning her abortion decision. Ill. Rev. Stat. ch. 111 1/2, para.

205.730(b)(2)(D). As interpreted by the lower courts, this provision directly conflicts with *Roe*'s provision that a woman is free to make her abortion decision "in consultation with her physician," *Roe*, 410 U.S. at 163, because it forbids this consultation. A key holding of *Roe* is therefore implicated, which justifies reconsideration of that case.

In sum, this Court ought to reconsider *Roe v. Wade* if it decides any constitutional issue in this case; because establishing the standard of review and confirming the right under which the case is brought are essential to the analysis of constitutionality; because explication of the standard of review is necessary to providing a reasoned, legal justification for the judgment; and because key aspects of *Roe* are implicated by the statutes themselves.

CONCLUSION

For the reasons given herein, this Court should reconsider *Roe v. Wade* in its consideration of the cases at bar. Upon reconsideration, this Court should determine that the doctrine of stare decisis does not preclude the reversal of *Roe v. Wade*,[15] *that, under the correct test for fundamentality,*[16] *there is no fundamental right to abortion in the history and tradition of our nation,*[17] *and that, therefore, Roe v. Wade* should be reversed.

Respectfully submitted,

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[15] *See* Brief Amici Curiae of the Hon. Christopher H. Smith, Alan B. Mollohan, Vin Weber, Robert K. Dornan, Earl Hutto, John La Falce, Virginia Smith, Bill Emerson, Henry H. Hyde, and Gordon J. Humphrey, Members of the Congress of United States, in Support of Appellants in *Turnock* and Cross-Petitioners in *Hodgson*.

[16] *See* Brief Amicus Curiae of Free Speech Advocates in Support of Appellants in *Turnock v. Ragsdale*.

[17] *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Appellants in *Turnock* and in Support of Cross-Petitioners in *Hodgson*.